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Supreme Court of the United States

October Term, 1965

No. 542

BENJAMIN PISANO,

Petitioner,

against

S. S. BENNY SKOU, her engines, boiler, tackle, etc., in rem, and OVE SKOU, D/S OVE SKOU, A/S and D/S af 1937 A/S,

Respondent,

against

JOHN T. CLARK & SON,

Respondent-Impleaded.

PETITIONER'S REPLY BRIEF

While the findings of the District Court were challenged in the Court below, following the settled rule of this Court that affirmed findings cannot be reviewed, petitioner has not taken issue with said findings and admits, without reservation, that petitioner improperly rigged the preventer wire which created an unseaworthy condition and which, some six working hours later, resulted in the accident and petitioner's injuries.

The District Court, in its opinion, did not take up the question of primary duty of the shipowner and of the stevedores to inspect, detect, and correct an open defect of which it knew or should have known. Its decision of some eight pages (pp. 9-16) [1] did not have a single word as to whether the shipowner used reasonable care to carry out its obligation and whether the stevedore performed in a workmanlike manner, retaining control over the opera-

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[1] Pages of Appendix.

tion by reasonable normal observation of the activity aboard its ship in order to carry out the continuing duty to provide the petitioner and his fellow workers with a seaworthy vessel and with a safe place to work.

The District Court, in exquisite detail, outlined the past history of the vessel and followed the activities of the petitioner and of the stevedore operation step by step from the time the vessel docked and work began at 1:00 P.M. on July 21st until the collapse of the boom at 10:00 A.M. on July 22nd. Throughout all of the opinion not a word was written about the duties, responsibilities or activities of any one other than the work gang, including petitioner, yet the Court of Appeals concluded that the entire issue of whether the shipowner, through its officers and crew members, or the stevedore, through its boss, carried out their duties toward the petitioner, was fully determined. The sentence: "The unseaworthiness, resulting from the manner in which the preventer wire was rigged, was the sole proximate cause of the injuries to libellant" (p. 16), was in fact held to be a full decision of the issue.

And so—with the use of one word upon which to base its decision and with total silence even to the presentation of the issue, the Court below ruled that it had been fully discussed and determined by the District Court.[2] Certainly the sentence was open to the interpretation that the petitioner was solely liable for creating the condition—as it is admitted he was for the purpose of argument.

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[2] If "sole" was a determination that the shipowner and stevedore carried out their responsibilities toward the petitioner, what was the District Court's basis for such finding? Where was the discussion of that responsibility and how that duty was fulfilled? Where was the discussion of the law applicable to the issue of such importance as to be the basis for the decision of the Court below?

Employment of the word out of all context has lead to the destruction of the petitioner's case—and not on the basis of findings but on the basis of absence of any findings at all.

The cases cited by petitioner all deal with the question of shipowner and stevedore duty toward business invitees. The different fact patterns cannot change the applicability of the rule of law whether the shipowner "knew" rather than "should have known" of the danger as in *Skovgaard* v. *Tungus*, 252 F. 2d 14 (3C), 358 U. S. 588 and *Connolly* v. *Weyerhaeuser*, 236 F. 2d 848 (2C), sub nom. *Weyerhaeuser* v. *Nacirema*, 355 U. S. 563, or whether non-liability was predicated upon lack of reasonable time to correct as in *Knox* v. *United*, 294 F. 2d 354 (3C). The other cases cited by petitioner, *Crumady* v. *Fisser*, 358 U. S. 423; *Beard* v. *Ellerman*, 289 F. 2d 201 (3C), sub nom. *Atlantic* v. *Ellerman*, 369 U. S. 355; *Gutierrez* v. *Waterman*, 373 U. S. 206; *Ferrante* v. *Swedish*, 331 F. 2d 571 (3C); *Brabazon* v. *Belships*, 202 F. 2d 904 (3C) and *Aldridge* v. *States*, 265 F. 2d 554 (9C), discussed the duty to inspect, detect and correct an open and obvious danger and predicated liability upon the failure to do so. Such is the case herein.

While the Court below did not take up the subject of whether the condition was visible to inspection and supervision, the District Court's decision clearly pointed out that the improper rig was "on the deck" from bolt to turnbuckle (p. 10), all in accordance with the uncontradicted proof that the preventer was rigged on the open deck of the vessel (21-24, 88).[3]

The Court of Appeals did not deny that the knotless rigging was on the deck but stated (although the District Court had been absolutely silent in the matter) that a "minute, continuous supervision of every detail" would have been necessary to detect the condition, a condition that was on the open deck during six hours of actual work operation and a fundamental part of the overall operation affecting the safety of the entire ship to such extent that the failure to properly rig caused the collapse of the ship's boom with its consequent injuries and damages.

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[3] Pages of the trial transcript.

Further, no mention at all was made of the duty of the stevedore to properly inspect and supervise the operation when once again the uncontroverted evidence was that he was to inspect this most important rigging routine to assure its safety during the cargo operation (9, 13, 41-42, 45, 322).

Such lack of proper inspection of the rigging by the stevedore boss so as to detect the lack of the knot was a failure to perform in a workmanlike manner, *Palazzo* v. *Pan-Atlantic,* 211 F. 2d 277 (2C), *sub nom. Ryan* v. *Pan-Atlantic,* 350 U. S. 124; *Italia* v. *Oregon,* 376 U. S. 315; *Calmar* v. *Nacirema,* 266 F. 2d 79 (4C); *Smith* v. *Jugosalvenska,* 278 F. 2d 176 (4C); *Ferrante* v. *Swedish,* 331 F. 2d 571 (3C); *Nicroli* v. *Den,* 332 F. 2d 651 (2C); *DeGioia* v. *United,* 304 F. 2d 421 (2C); *Caputo* v. *United,* 311 F. 2d 413 (2C); *Santomarco* v. *United States,* 277 F. 2d 255 (2C), giving raise to liability of the shipowner, with indemnification over from the stevedore.

We are now faced with the situation of failure of a District Court to make any determination on this most important of issues, and an affirmance by the Court below, not on any factual basis (since there was none) but on the use of one word taken out of context in the discussion of another issue.

This issue of shipowner and stevedore duty to inspect, etc., has more and more frequently come before various Courts of Appeals in recent years, arising out of the concept that the shipowner cannot surrender control over its ship to evade its duty to provide business invitees with a seaworthy vessel, *Alaska* v. *Petterson,* 347 U. S. 396. While in this matter petitioner created the unseaworthy condition, shipowner's liability was predicated, *inter alia,* upon the intervening failure of the shipowner and stevedore to fulfill their duties to inspect, detect and correct that condition, as laid down by this Court in *Weyerhaeuser* v. *Nacirema,*

supra. This Court must now decide whether an open, dangerous condition for a period of six working hours and twenty-one hours in all, remaining dangerous through periods when there was or should have been an inspection by either or both the shipowner and stevedore, can be laid only at the feet of its creator, for if that is so the effect of the *Petterson* decision concerning shipowner's primary duty has been utterly destroyed. Not only did the shipowner herein improperly surrender control over its vessel but it did so to one longshoreman, the petitioner. It is truly amazing how the petitioner's mistake, made so long before the accident, through work periods when inspection was required, through periods of changes in the boom position requiring inspection, through changes in cargo requiring inspection, was still considered the sole cause of all that befell him,[4] while those in command stood aside, did nothing—and now innocently cluck their tongues.[5]

For the destruction of this Court's decisions, in negating the shipowner's and stevedore's primary duty to watch over

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[4] The cases cited by respondent-impleaded on page 4 of its brief in opposition concern matters in which there was no time element between plaintiff's wrongful act and the accident. As such they are not material herein.

[5] A similar situation arose in *Ballwanz* v. *Isthmian*, 319 F. 2d 457 (4C), in which the Fourth Circuit rejected the concept of plaintiff-longshoreman's contributory negligence for injuries sustained during the loading of cargo, in operation for three hours.

> "The plaintiff longshoreman was at the bottom of the hierarchy of command and we fail to see how we can be held responsible for the manner of operations of the stevedore company. The defendant ship owner has a general responsibility for the manner in which the loading operations on his vessel were carried out. If it was negligent and dangerous to 'sling' the spreaders up instead of passing them up, then this manner of operation had been going on under the general supervision of the ship owner and the particular supervision of the stevedore company for nearly three hours before the injury occurred" (p. 460).

the vessel, petitioner submits that this Court should consider, at this time, what responsibility is demanded of the shipowner and of the stevedore so as to provide a known basis of safety to the working gangs, all in accordance with decisions of this Court and various Courts of Appeals, cited above.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of the petition.

Dated: October 11, 1965.

Respectfully submitted,

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